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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PAKISTAN NATIONAL SHIPPING CORP.,

Petitioner,

—v.—

MOUNT ROYAL MARINE REPAIRS, LTD., ALUMINUM COMPANY OF CANADA, LIMITED and EMPIRE STEVEDORING COMPANY, LTD.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

Must a District Court, in a federal question maritime suit involving a shipping company owned by a foreign state, apply a uniform federal standard in determining the Fifth Amendment due process limits of acquiring personal jurisdiction of third-parties impleaded into the suit?

Is the long arm statute of New York, which permits jurisdiction of a foreign corporation that derives substantial revenue from international commerce and commits a tort which it knows could cause injury and does cause injury in New York, unconstitutional under the Due Process Clause of the Fifth Amendment?

Parties Involved

All parties to the proceeding below are named in the caption of the case except for Thomas Mascuzzio, plaintiff decedent, by Anna Mascuzzio, his administratrix, the plaintiff below. This information is provided pursuant to Supreme Court Rule 21.1(b).

Pakistan National Shipping Corp. is a foreign state as defined in 28 U.S.C. 1603 its shares being owned by the Government of Pakistan. This information is provided pursuant to Supreme Court Rule 28.1.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
PARTIES INVOLVED	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT	3
1. The District Court Decision	4
2. The Court of Appeals Decision	5
REASONS FOR GRANTING THE WRIT OF CERTIORARI	5
I. The Lower Federal Courts Are in Complete Disaccord as to Whether a Federal or State Standards Govern the Constitutional Limits of in Personam Jurisdiction in Federal Question Cases	5
A. The Lower Courts Have Specifically Recognized The Uncertainty on this Issue	5
B. The Failure to Establish a Clear Test Has Led the Lower Courts to Expound Irreconcilable Criteria and Hence Reaching Conflicting Results	6
II. The Finding that New York's Long Arm Statute is Unconstitutional Will Be Particularly Disruptive of New York, Federal and Maritime Practice	8
CONCLUSION	9

APPENDIX:

Opinion of the Court of Appeals A1

Opinion of the District Court A3

TABLE OF AUTHORITIES

Cases:

Aquascutum of London, Inc. v. *S.S. American Champion*, 426 F.2d 205 (2d Cir 1970) 6

Arrowsmith v. *United Press International*, 320 F.2d 219 (2d Cir. 1963) 6

De James v. *Magnificence Carriers, Inc.*, 654 F.2d 280 (3 Cir. 1981) 6, 7

GRM v. *Equine Inv. and Man. Group*, 596 F.Sup. 307 (S.D. Texas 1984) 8

Hedrick v. *Daiko Shoji Co., Ltd., Osaka*, 715 F.2d 1355 (9 Cir. 1983) 7

Insurance Corp. of Ireland v. *Compagnie Des Bauxites de Guinea*, 456 U.S. 694 ..... 6, 8

Koupetoris v. *Konkar Intrepid Corp.*, 535 F.2d 1392 (2d Cir. 1976) 6

Leasco Data Processing Equipment Corp. v. *Maxwell*, 468 F.2d 1326 (2d Cir. 1972) 7

Shaffner v. *Heitner*, 433 U.S. 186 6

Trans-Asiatic Oil Ltd., S.A. v. *Apex Oil Company*, 743 F. 2d 956 (1 Cir. 1984) 8

World-Wide Volkswagen Corp. v. *Woodson*, 444 U.S. 286 6

Statutes and Rules:

28 U.S.C. §1254(1) 2

28 U.S.C. §1330 5

28 U.S.C. §1333(1) 5

C.P.L.R. §302 2

Civil Practice Law and Rules §302(a)(3)(ii) 5

Federal Rules of Civil Procedure 9(h) 5

Other Authorities:

Moore's Federal Practice: §4.25[7] 6

Restatement (Second) of Foreign Relations Laws: §18 7

IN THE

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October Term, 1984

No. 84-

PAKISTAN NATIONAL SHIPPING CORP.,

Petitioner,

—v.—

MOUNT ROYAL MARINE REPAIRS, LTD., ALUMINUM COMPANY OF CANADA, LIMITED and EMPIRE STEVEDORING COMPANY, LTD.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The petitioner, PAKISTAN NATIONAL SHIPPING CORP., respectfully prays that a writ of certiorari be issued to review the decision of the Second Circuit in this case, entered on January 23, 1985.

Opinions Below

The opinion of the Court of Appeals was reported at No. 84-7712 (2d Cir. January 23, 1985) and is set forth in the Appendix, *infra,* pp. A1 to A2. The decision of the United States District Court for the Southern District of New York is not officially reported and appears in the Appendix, *infra,* pp. A3 to A12, dated June 29, 1984.

Jurisdiction

The opinion of the Court of Appeals for the Second Circuit was entered on January 23, 1985.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Constitutional and Statutory Provisions Involved

AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

§302. Personal jurisdiction by acts of non-domiciliaries

(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:

1. transacts any business within the state; or

2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or

3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or

4. owns, uses or possesses any real property situated within the state.

(b) Personal jurisdiction over non-resident defendant. A court in any matrimonial action or family court proceeding involving a demand for support or alimony may exercise personal jurisdiction over the respondent or defendant notwithstanding the fact that he or she no longer is a resident or domiciliary of this state, or over his or her executor or administrator, if the party seeking support is a resident of or domiciled in this state at the time such demand is made, provided that this state was the matrimonial domicile of the parties before their separation, or the defendant abandoned the plaintiff in this state, or the obligation to pay support or alimony accrued under the laws of this state or under an agreement executed in this state.

(c) Effect of appearance. Where personal jurisdiction is based solely upon this section, an appearance does not confer such jurisdiction with respect to causes of action not arising from an act enumerated in this section.

Statement

On the morning of July 30, 1981 Thomas Mascuzzio and other longshoremen employed by Universal Maritime Services Corp. boarded the M/V KAPTAI owned by PAKISTAN NATIONAL SHIPPPING CORP. ("PAKISTAN"), a state con-

trolled carrier, while that vessel was moored at Pier 2 Port Authority in Brooklyn. The longshoremen first proceeded to the No. 2 hatch upper 'tween deck of that vessel to remove hatch boards and hatch beams in order to load cargo in the lower portions of that hatch. (CR-10)*

Mr. Mascuzzio is said to have been walking on the hatch boards when two of those boards gave way causing him to fall into the next level of the No. 2 hatch and sustain personal injuries. It is further alleged that Mr. Mascuzzio died as a result of those injuries. (CR-9)

Anna Mascuzzio, the administratrix of the estate of Thomas Mascuzzio, commenced suit in the United States District Court, Southern District of New York, alleging that the injuries and death were caused by PAKISTAN having failed to furnish a safe place to work. In particular, Mascuzzio claims that PAKISTAN failed to supply suitable, safe and adequate walking and working surface and that the hatch beams and boards were not properly put in place. (CR-9)

In that MOUNT ROYAL MARINE REPAIRS, LTD. ("MOUNT ROYAL") had recently measured for, manufactured and delivered hatch boards for the No. 2 hatch upper 'tween deck (A-55); EMPIRE STEVEDORING COMPANY, LTD. ("EMPIRE") had last placed the hatch beams in the No. 2 hatch upper 'tween deck (A-57); and ALUMINUM COMPANY OF CANADA, LIMITED ("ALCAN") had last placed the hatch boards in the forward end of the No. 2 hatch upper 'tween deck, each was impleaded as a third-party defendant.

1. The District Court Decision

Because the dispute between PAKISTAN and EMPIRE, MOUNT ROYAL and ALCAN involved a maritime matter,

*Citations to the record below are to the Court Record, cited CR.

jurisdiction lay in the District Court pursuant to F.R.C.P. 9(h) and 28 U.S.C. §1333(1). In addition, PAKISTAN being a state controlled carrier, the District Court also had jurisdiction pursuant to 28 U.S.C. §1330.

EMPIRE, MOUNT ROYAL and ALCAN, in lieu of answering, moved the District Court to dismiss the third-party complaint for lack of personal jurisdiction.

Each requested and the District Court orally granted a stay of all discovery pending a determination of the motion to dismiss.

The District Court held that New York's long arm statute, C.P.L.R. §302(a)(3)(ii), as applied to the facts of this case was unconstitutional under the Due Process Clause of the United States Constitution. Accordingly, the District Court dismissed PAKISTAN's third-party complaint.

2. The Court of Appeals Decision

On appeal from the District Court's judgment, the Second Circuit affirmed stating only that its affirmance was substantially for the reasons given in Judge Motley's opinion, dated June 29, 1984.

Reasons for Granting the Writ of Certiorari

I. The lower federal courts are in complete disaccord as to whether a federal or state standards govern the constitutional limits of *in personam* jurisdiction in federal question cases.

A. The lower courts have specifically recognized the uncertainty on this issue.

This Court has greatly clarified the constitutional perimeters of the lower federal courts on the issues of personal jurisdiction

in diversity and quasi-in-rem cases. *World-Wide Volkswagen Corp.* v. *Woodson,* 444 U.S. 286; *Insurance Corp. of Ireland* v. *Compagnie Des Bauxites de Guinea,* 456 U.S. 694; *Shaffner* v. *Heitner,* 443 U.S. 186. The test to be applied in determining personal jurisdiction in federal question cases, however, has clearly not been authoritatively established. Although the same issue of the standards to be used in determining personal jurisdiction were expounded on at length by Justices Friendly and Clark in *Arrowsmith* v. *United Press International,* 320 F.2d 219 (2d Cir. 1963), that court stated that it expressed no opinion on whether a federal standard may govern jurisdiction over foreign corporations in federal questions litigation.

Federal courts have continued to leave open the question whether state law or federal law is controlling on this issue. *Koupetoris* v. *Konkar Intrepid Corp.,* 535 F.2d 1392, 1395 n. 13 (2d Cir. 1976); *Aquascutum of London* v. *S.S. AMERICAN CHAMPION,* 426 F.2d 205, 211 n. 4 (2d Cir. 1970).

The question of which law, state or federal, determines the federal courts personal jurisdiction of a foreign corporation, as stated in *Moore's Federal Practice* has given rise to conflicting and confusing decisions. ¶4.25[7] and numerous law review articles and commentaries referred to in n. 1 thereto.

B. The failure to establish a clear test has led the lower courts to expound irreconcilable criteria and hence reaching conflicting results.

Two recent cases in addition to this case, all involving personal jurisdiction of foreign corporations in lawsuits involving injured longshoremen in United States ports, highlight the conflicting tests and results due to the lack of a uniform standard.

In *De James* v. *Magnificence Carriers, Inc.,* 654 F.2d 280 (3 Cir. 1981) the court, over a vigorous dissent, held that the personal jurisdiction of the foreign Japanese corporation must be judged by the standards of the Fourteenth Amendment and

not the Fifth Amendment. The majority reasoned that despite the defendant knowing that the product of its labor (the converted ship) by necessity would call at different ports of the world there was no jurisdiction and based its conclusion on the lack of economic benefit the foreign corporation received from the residents of New Jersey.

In *Hedrick* v. *Daiko Shoji Co., Ltd., Osaka,* 715 F.2d 1355 (9 Cir. 1983), the court found *in personam* jurisdiction of a foreign Japanese corporation constitutionally permissible. The product of labor in *Hedrick* was a wire splice delivered to a vessel which at some later time called at a port in Oregon. The court agreed with the dissenting judge in *De James* that when one supplies a product of labor to an ocean carrier, the fact that the ship goes to a foreign port is not fortuitous. It is certain.

The District Court below based the constitutional test on the extent of defendants' contacts with the state in which the court was sitting. This approach, while stated to be a Fifth Amendment approach, was certainly more analogous to one under the Fourteenth Amendment testing the constitutional extent of a state exercising its sovereignty.

A quite different and more proper test was used in *Leasco Data Processing Equipment Corp.* v. *Maxwell,* 468 F.2d 1326 (2d Cir. 1972). *Leasco* involved an analysis of personal jurisdiction of an entity committing acts outside of the United States having an effect in New York. *Leasco* cited as a classic example of where personal jurisdiction would exist as a man who shoots a bullet across a state boundary. Certainly, a Canadian corporation who creates a hidden trap in having an unsecured hatch board placed on an ocean going vessel knows with more certainty that the first person who steps on the area of the hidden trap will be bodily injured than someone who randomly shoots a bullet across the border. *Leasco* held that the proper test was laid down in §18 of the Restatement (Second) of Foreign Relations Law and specifically that the effect "occurs as a direct and foreseeable result of the conduct outside the territory."

The First Circuit in *Trans-Asiatic Oil Ltd., S.A.* v. *Apex Oil Company,* 743 F.2d 956 (1 Cir. 1984), has held that the limits on a state's power over non-resident defendants do not apply to a federal court sitting in admiralty in that state.

In sum, it is apparent that the constitutional analysis in federal question cases has been inconsistent and in conflict leading to an incorrect test and result in this case.

II. The finding that New York's long arm statute is unconstitutional will be particularly disruptive of New York, federal and maritime practice.

The decision below that although the defendant(s) admittedly derived substantial revenues from international commerce and knew the product of their labor was going to be in the jurisdiction of the District Court, that court cannot constitutionally exercise jurisdiction unless the defendant has attempted to serve the market of the state in which the court sits, not only will cause uncertainty in federal question cases, but also in New York State litigation.

Recent case law following this Court's holding in the Fourteenth Amendment case of *Insurance Company of Ireland, supra,* that due process is not a matter of sovereignty, but of individual liberty will be eroded.

By basing its constitutional analysis on a state sovereign test and the quantity of the contacts with a given state the decision will only lead to greater litigation with less predicability. *See, GRM* v. *Equine Inv. and Man. Group,* 596 F.Sup. 307 (S.D. Texas 1984).

CONCLUSION

The decision in this case highlights the lack of a uniform standard upon which the lower courts have written conflicting decisions in an area that is a foundation of the federal court system. PAKISTAN submits this had led to the lower court erroneously finding the New York statute unconstitutional and thereby dismissing the third-party complaints.

Respectfully submitted,

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APPENDIX

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 23rd day of January, one thousand nine hundred and eighty-five.

Present: HONORABLE WILFRED FEINBERG
Chief Judge

HONORABLE HENRY J. FRIENDLY
HONORABLE WALTER R. MANSFIELD
Circuit Judges

84-7712

THOMAS MASCUZZIO, Plaintiff Decedent by ANNA MASCUZZIO, his administratrix,

Plaintiff-Appellee,

—v.—

PAKISTAN NATIONAL SHIPPING CORP.,

Defendant and Third-Party Plaintiff-Appellant,

—v.—

MOUNT ROYAL MARINE REPAIRS, LTD., ALUMINUM COMPANY OF CANADA, LIMITED and EMPIRE STEVEDORING COMPANY, LTD.,

Third-Party Defendants-Appellees.

Opinion of the Court of Appeals

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is AFFIRMED substantially for the reasons given in Judge Motley's opinion, dated June 29, 1984.

WILFRED FEINBERG,
Chief Judge

HENRY J. FRIENDLY

WALTER R. MANSFIELD
Circuit Judges

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

Opinion of the District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THOMAS MASCUZZIO, Plaintiff Decedent by ANNA MASCUZZIO, his administratrix,

Plaintiff,

—against—

PAKISTAN NATIONAL SHIPPING CORP.,

Defendant and Third-Party Plaintiff,

—against—

MOUNT ROYAL MARINE REPAIRS, LTD., ALUMINUM COMPANY OF CANADA, LIMITED and EMPIRE STEVEDORING COMPANY, LTD.,

Third-Party Defendants.

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MOTLEY *Ch. J.*

Opinion of the District Court

Memorandum Opinion

Plaintiff, by his administratrix, has brought this action, under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§901 *et seq.*, to recover damages arising out of personal injuries and wrongful death. On July 30, 1981, plaintiff, a longshoreman working aboard the M/V KAPTAI (the vessel), was injured by a fall on board that vessel while it was docked in New York City. The injuries suffered in this fall allegedly resulted in plaintiff's death. Defendant Pakistan National Shipping Corp. (PNC) has filed a third-party complaint against three Canadian companies, Mount Royal Marine Repairs, Ltd. (MRM), Aluminum Company of Canada, Limited (ALCAN) and Empire Stevedoring Company, Ltd. (Empire). PNC argues that it should have a right of indemnification or contribution against the third-party defendants for any recovery obtained by plaintiff.

Plaintiff fell from the upper 'tween deck of the vessel's No. 2 hatch to the deck below when hatch boards on which he was walking gave way. MRM had manufactured and delivered new hatch boards to the vessel in Canada before the vessel arrived in New York City. ALCAN may have put the hatch boards in place prior to plaintiff's fall. The hatch beams upon which the hatch boards rested had been removed and replaced in Canada by Empire.

This case is before the court on motions made by the third-party defendants. All three third-party defendants ask the court to dismiss the third-party complaint for lack of *in personam* jurisdiction. ALCAN also moves in the alternative, asking the court to dismiss the third-party complaint on the ground of *forum non conveniens*. The court concludes that it does not have personal jurisdiction over the third-party defendants. Therefore, the court grants the motion to dismiss the third-party complaint

as to all third-party defendants. Accordingly, the court does not address ALCAN's *forum non conveniens* argument.

Discussion

Analysis of these motions to dismiss proceeds on two levels. First, the court must consider the operation of the applicable section of the New York long-arm statute. Second, the court must determine whether the due process clause will permit a finding of jurisdiction over these parties. The Second Circuit apparently has not considered the precise question raised by these motions to dismiss. This court's own reading of relevant case law indicates that the motions should be granted.[1]

The essential question under New York law is whether jurisdiction exists under the New York long-arm statute, N.Y. C.P.L.R. §302(a)(3)(ii) (McKinney 1972). Section 302(a) provides for jurisdiction over a person who,

> 3. commits a tortious act without the state causing injury to person or property within the state, . . . if he . . . (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce.[2]

The court will assume that the third-party defendants derive substantial revenue from international commerce. Thus, the key to a ruling under New York law is a determination as to

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[1]The court sees no need to allow PNC to use additional discovery to search for further support for its case. *See Data Disc, Inc.* v. *Systems Technology Associates, Inc.*, 557 F.2d 1280, 1285 n.1 (9th Cir. 1977); *Findlay* v. *Duthuit*, 86 A.D.2d 789, 790, 446 N.Y.S.2d 951, 953 (1st Dep't 1982).

[2]There has been no suggestion that other provisions of the long-arm statute are applicable to this case.

whether the third-party defendants expected or reasonably should have expected their acts to have consequences in New York.

PNC has not satisfied its burden of proving the reasonableness of such expectation with respect to MRM and ALCAN. *Beacon Enterprises, Inc.* v. *Menzies*, 715 F.2d 757, 762 (2d Cir. 1983). In order to establish a reasonable expectation as provided for in section 302(a)(3), there must have existed "some potential [New York] consequence [which] was reasonably forseeable rather than fortuitous." *Tracy* v. *Paragon Contact Lens Laboratories, Inc.*, 44 A.D.2d 455, 458, 355 N.Y.S.2d 650, 653 (3rd Dep't 1974). The test for determining whether such reasonable forseeability exists is objective rather than subjective. *Allen* v. *Auto Specialties Mfg. Co.*, 45 A.D.2d 331, 333, 357 N.Y.S.2d 547, 550 (3rd Dep't 1974). In addition, the test is to be viewed in terms of general forum consequences rather than specific consequences. *Id.* Even so, the evidence before the court does not support a finding of a reasonable expectation of forum consequences for MRM and ALCAN. *See Martinez* v. *American Standard*, 91 A.D.2d 652, 457 N.Y.S.2d 97 (2d Dep't 1982), *aff'd mem.*, 60 N.Y.2d 873, 470 N.Y.S.2d 367 (1983). Neither MRM nor ALCAN has offices or employees in New York. Neither party solicits business here directly or indirectly by means of a telephone listing. The simple fact that vessels calling in Canada often call at ports along the eastern seaboard does not create a reasonable expectation of consequences in New York. Indeed, for MRM and ALCAN only "sheer speculation" would posit New York consequences. *Fantis Foods, Inc.* v. *Standard Importing Co.*, 49 N.Y.2d 317, 327 n.4, 425 N.Y.S.2d 783, 787 n.4, 402 N.E.2d 122, 125 n.4 (1980).

PNC's claim that Empire had actual notice of the vessel's itinerary places Empire in a different light. By itself, the fact that one of Empire's employees knew that the vessel would call

at New York City might or might not create a reasonable expectation of forum consequences on the part of Empire. *Cf. Insurance Company of North America* v. *Marina Salina Cruz,* 649 F.2d 1266, 1274 (9th Cir. 1981) (Schroeder, J. concurring). In view of the conclusions which follow, however, the court sees no reason to make further inquiry into whether Empire should have expected its actions to have New York consequences.

The court's holding that New York law will not permit a finding of jurisdiction over MRM and ALCAN appears contrary to the decision in *Garbellotto* v. *Montelindo Compagnie Navegacion, S.A.,* 294 F. Supp. 487 (S.D.N.Y. 1969). *See also Farina* v. *Compania Sud Americana de Vapores,* 68 AMC 829 (1968). *Garbellotto* is distinguishable from the instant case in that the third-party defendant in *Garbellotto* did not raise the issue of reasonable forseeability of New York consequences. *Id.* at 489. To the extent that *Garbellotto* is indistinguishable from the instant case, the court finds *Garbellotto* unpersuasive in light of more recent interpretation of the long-arm statute provided by New York courts.

The court also must consider whether the constitutional concerns of the due process clause will permit jurisdiction over the third-party defendants. Resolution of the due process concerns in this case turns on the court's reading of the Supreme Court's decision in *World-Wide Volkswagen Corp.* v. *Woodson,* 444 U.S. 286 (1980). In that case, the Supreme Court held that the due process clause required more than "the mere likelihood that a product will find its way into the forum State." *Id.* at 297. Instead, the Court searched for contacts which suggested that the petitioner, a New York automobile dealer, "should [have] reasonably anticipate[d]" being called into court in Oklahoma. Finding more, the court held that Oklahoma could not exercise jurisdiction over the petitioner. The Court distinguished

the situation in which a manufacturer or distributor attempted to service a market. In a related vein, the Court observed that the due process clause allows jurisdiction over corporations which place products into the "stream of commerce." *Id.* at 298. Under those circumstances, corporations might be deemed to have " 'purposefully [availed themselves] of the privilege of conducting activities within the forum State.' " *Id.* at 297 (*citing Hanson* v. *Denckla*, 357 U.S. 235, 253 (1958)).

As an initial matter, the court notes the absence of any mechanical test for evaluating compliance with the due process clause. *Insurance Company of North America* v. *Marina Salina Cruz*, 649 F.2d at 1270. Instead, the court must balance the circumstances present in the individual case. The court concludes that subjecting any of these third-party defendants to jurisdiction here would violate the due process clause of the fifth amendment.[3]

It cannot be said that the third-party defendants in this case were attempting to serve the New York market. The extent of any contact with this forum consists of Empire's advertisement in a publication originating in New York. Empire's president

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[3]The Ninth Circuit employs a three-step analysis of due process problems: (1) the non-resident must purposely avail itself of the benefits of conducting activities in the forum in question, (2) the claim must arise out of the non-resident's forum-related activities, (3) jurisdiction over the non-resident must appear reasonable. *See, e.g., Data Disc, Inc.* v. *Systems Technology Associates, Inc.*, 557 F.2d at 1287. The opinions in *Insurance Company of North America* v. *Marina Salina Cruz*, 649 F. 2d 1266, 1270 (9th Cir. 1981), and *Hedrick* v. *Daiko Shoji Co., Ltd., Osaka*, 715 F.2d 1355, 1359 (9th Cir. 1983), suggest that the ultimate test is primarily one of reasonableness. Thus, this court will not follow the procedure set forth in *Data Disc*. Instead, the court will consider generally whether the third-party complaint adheres to the admonition in *World-Wide Volkswagen* that the third-party defendants should "reasonably anticipate being haled into court" in New York. 444 U.S. at 297.

also is alleged to have visited New York on several occasions. As indicated, none of the third-party defendants has manufacturing facilities, offices, employees or directory listings in New York. That the misconduct alleged by PNC is the result of negligence or recklessness rather than intentional activity further militates against a finding of purposeful activity in this case. *Insurance Company of North America* v. *Marina Salina Cruz,* 649 F.2d at 1270-71; *Data Disc. Inc.* v. *Systems Technology Associates, Inc.,* 557 F.2d 1280, 1288 (9th Cir. 1977).

The court finds the position of the third-party defendants in this case analogous to that of the defendant in *Marina Salina Cruz.* In that case, the Ninth Circuit found that the principles of due process propounded in *World-Wide Volkswagen* would not permit Alaska to exercise long-arm jurisdiction over a Mexican shipyard charged with negligent repair of a vessel which sank in Alaskan waters. The court reached this conclusion even though the defendant shipyard allegedly was aware that the vessel would travel to Alaska. The court explained that exercise of long-arm jurisdiction would be "unreasonable" given the "minimal nature of the shipyard's purposeful interjection into Alaska." *Id.* at 1271. Similarly, the absence of any significant involvement in New York by the third-party defendants makes jurisdiction over them appear unreasonable. *See also DeJames* v. *Magnificence Carriers, Inc.,* 654 F.2d 280, 285-86 (3d Cir.), *cert. denied,* 454 U.S. 1085 (1981).

The court could adopt the alternative tack of accepting jurisdiction under the "stream of commerce" analysis prominent in products liability decisions. *DeJames,* 654 F.2d at 285; *American President Lines Ltd.* v. *Metropolitan Stevedore Services,* 567 F. Supp. 169, 171 (W.D. Wash. 1983). Those decisions typically involve standardized goods distributed on a mass scale. *Cf. Hedrick* v. *Daiko Shoji Co., Ltd., Osaka,* 715 F.2d 1355, 1358 (9th Cir. 1983). Essential to the maintenance of juris-

diction in such actions is the existence of "an extensive chain of distribution" for the product in question. *DeJames,* 654 F.2d at 285. Under stream of commerce analysis, a manufacturer is susceptible to jurisdiction because it derives legal and economic benefits from "increasing the distribution of its products through indirect sales within the forum." *Id.*

PNC relies heavily on a decision resting on stream of commerce analysis, *Hedrick* v. *Daiko Shoji Co. Ltd., Osako,* 715 F.2d at 1358. *See* Tr. at 9-10. In *Hedrick,* a Ninth Circuit panel reversed dismissal of a claim against a Japanese manufacturer of wire-rope splices. The panel explained that "[w]hile Daiko's purposeful interjection of its activities into Oregon was not extensive, the company sent a defective product into the world market with knowledge that harm could occur wherever a defect should manifest itself." *Id.* at 1359.

Stream of commerce analysis is inapplicable to this case. Neither the character of goods provided nor the chain of their distribution is that of a products liability action. The hatch boards manufactured by MRM are individually cut for each vessel. Tr. at 4-5. As the court noted at the hearing of this motion, the manufacture of hatch boards is carpentry work which is different in kind from the mass production of wire-rope splices in *Hedrick.* Tr. at 10-11; *see Hedrick,* 715 F.2d at 1358 ("Daiko produces over 300,000 splices per year, many of them for ocean-going vessels. Daiko, though it produces its splices only in Japan, manufactures for a world-wide market and provides splices for ships that serve world ports."). Clearly, the stevedoring activities of ALCAN and Empire constitute the provision of services rather than the introduction of goods into a world market. Also absent from this case is any indication of benefits accruing to the third-party defendants from an extensive chain of distribution. Accordingly, the court will not characterize PNC as a "distributor" for the third-party defendants.

DeJames, 654 F.2d at 286. In sum, the court will not accept jurisdiction over the third-party defendants under the rubric of stream of commerce analysis.[4]

CONCLUSION

For the reasons discussed above, the court grants the motions of the third-party defendants to dismiss the third-party complaint against them for lack of personal jurisdiction, Fed. R. Civ. P. 12(b)(2).

Dated: New York, New York
June 29, 1984

CONSTANCE BAKER MOTLEY
Chief Judge

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[4]The court notes that Canada offers a reasonable alternative forum for resolution of the third-party claims. Moreover, New York's interest in protecting the interest of a non-resident third-party plaintiff, like PNC, is not as great as New York's interest in protecting the rights of New York plaintiffs. *See Donnely* v. *Copeland Intra Lenses, Inc.,* 87 F.R.D. 80, 85 (E.D.N.Y. 1980).

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No. 84-1675

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PAKISTAN NATIONAL SHIPPING CORP.,

Petitioner,

—against—

MOUNT ROYAL MARINE REPAIRS, LTD., ALUMINUM COMPANY OF CANADA, LIMITED and EMPIRE STEVEDORING COMPANY, LTD.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THIRD-PARTY RESPONDENT EMPIRE STEVEDORING COMPANY, LTD. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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8 pp

TABLE OF CONTENTS

PAGE

OPINIONS BELOW 1

JURISDICTION 1

QUESTIONS PRESENTED 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT 2

ARGUMENT:

I.—There is no disaccord as to whether Federal or State standards govern the Constitutional limits of in personam jurisdiction in Federal question cases 3

II—There was never any finding that New York's long arm statute was unconstitutional 4

CONCLUSION 5

TABLE OF AUTHORITIES

Cases:

De James v. *Magnificence Carriers, Inc.*, 654 F.2d 280 (3rd Cir.) *cert. denied*, 454 U.S. 1085 (1981) 3

Hedrick v. *Daiko Shoji Co., Ltd., Osaka*, 715 F.2d 1355 (9th Cir. 1983) 3

Leasco Data Processing Equipment Corp. v. *Maxwell*, 468 F.2d 1326 (2d Cir. 1972) 4

Martinez v. *American Standard*, 91 A.D.2d 652, 457 N.Y.S. 2d 97 (2d Dep't 1982), aff'd 60 N.Y.2d 873, 458 N.E. 2d 826, 470 N.Y.S.2d 367 (1983) 5

Trans-Asiatic Oil Ltd., S.A. v. *Apex Oil Company*, 743 F. 2d 956 (1st Cir. 1984) 4

Statutes and Rules:

Securities Exchange Act, Sec. 27 4
New York Civil Practice Law and Rules, §302 2
New York Civil Practice Law and Rules, §302(a)(3)(ii) 3
Federal Rules of Civil Procedure, Rule B 4

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1984
No. 84-1675

PAKISTAN NATIONAL SHIPPING CORP.,

Petitioner,

—against—

MOUNT ROYAL MARINE REPAIRS, LTD., ALUMINUM COMPANY OF CANADA, LIMITED and EMPIRE STEVEDORING COMPANY, LTD.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THIRD-PARTY RESPONDENT EMPIRE STEVEDORING COMPANY, LTD. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinions Below

The opinion of the Court of Appeals was reported at No. 84-7712 (2d Cir. January 23, 1985) and is set forth in the Appendix of the Petition pp. A1 to A2. The decision of the United States District Court for the Southern District of New York dated June 29, 1984 is not officially reported and appears in the appendix of the Petition pp. A3 to A12.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Questions Presented

Are the lower federal courts in disaccord as to whether federal or state due process standards govern the constitutional limits of in personam jurisdiction in federal question cases?

Did the District Court in fact find that the New York long arm statute is unconstitutional?

Constitutional and Statutory Provisions Involved

The pertinent provision of the U.S. Constitution (Amendment V) and the New York Long Arm Statute N.Y. C.P.L.R. Sec. 302 are set forth in the Petition at pp. 2-3.

Statement

The facts are set forth in the District Court opinion (Petition pp. A3 to A12) and will not be repeated here at length. In short, insofar as EMPIRE STEVEDORING COMPANY, LTD. (hereinafter EMPIRE) is concerned, it is alleged that EMPIRE placed hatch beams at the No. 2 upper 'tween deck hatch of the M.V. KAPTAI after loading at Montreal, and further that these beams were improperly placed due to the negligence, breach of contract, and/or breach of warranty of EMPIRE, and that thereafter, after additional loading at Port Alfred, Philadelphia, and Baltimore, while the vessel was at New York, plaintiff fell through the hatch boards at No. 2 upper 'tween deck and was killed as a result of the improper placement of the hatch beams by EMPIRE.

EMPIRE moved in the District court to dismiss the third party complaint against it on jurisdictional grounds since it was a Canadian corporation without any office or agent in New York, and since it neither does nor solicits business there, and has no property (real or personal) in New York. Defendant and Third Party

Plaintiff-Petitioner opposed the motion on the ground that EMPIRE was subject to the jurisdiction of the Court based on Section 302(a) (3) (ii) of the New York Civil Practice Law & Rules (CPLR). The District Court found that jurisdiction over EMPIRE could not be exercised under CPLR 302(a) (3) (ii) when read in conjunction with the due process clause of the United States Constitution and accordingly dismissed.

The U.S. Court of Appeals for the Second Circuit affirmed.

ARGUMENT

I.

There is no disaccord as to whether Federal or State standards govern the Constitutional limits of in personam jurisdiction in Federal question cases.

Petitioner claims that the lower Federal Courts are in complete disaccord as to whether a Federal or State standard governs the Constitutional limits of in personam jurisdiction in Federal question cases—that is, whether the defendant's contacts with the U.S. as a whole (Federal) or only its contacts with the individual state (State) govern the due process question. But there is no such disaccord.

Petitioner cites only four cases in support of its position; one from the Third, one from the Ninth, one from the Second, and one from the First Circuit. But these cases are all easily reconcilable on their facts.

In the Third Circuit case, *DeJames* v. *Magnificence Carriers, Inc.*, 654 F.2d 280 (3rd Circuit) *cert. denied*, 454 U.S. 1085 (1981), and the Ninth Circuit case, *Hedrick* v. *Daiko Shoji Co., Ltd., Osaka*, 715 F.2d 1355 (9th Cir. 1983), the Courts applied a state standard because in personam jurisdiction was based solely on a state long arm statute.

On the other hand, in the Second Circuit case, *Leasco Data Processing Equipment Corp.* v. *Maxwell,* 468 F.2d 1326 (2d Cir. 1972), the basis of in personam jurisdiction was Sec. 27 of the Securities Exchange Act, a wholly Federal statute, and accordingly the Court used a Federal standard, since no state statute was involved in the in personam jurisdiction question. *Leasco,* cited *supra,* 468 F.2d 1326, 1339-1340. Similarly, in the First Circuit case, *Trans-Asiatic Oil Ltd. S.A.* v. *Apex Oil Company,* 743 F. 2d 956 (1st Cir. 1984), the basis of in personam jurisdiction was Rule B of the Federal Rules of Civil Procedure, again a whole Federal statute, and again, the Court used a Federal standard, since no state statute was involved.

The distinction, therefore, appears clear. Where in personam jurisdiction, even in a Federal question case, is based on a state long arm statute, a state standard is applied. Where the basis of in personam jurisdiction is a Federal statute or rule, a Federal standard is applied.

There is therefore, no disaccord. Even if there were, however, this would be an unlikely case for review by the U.S. Supreme Court, because at no time has the petitioner made even the remotest factual showing that application of a Federal rather than a State standard would result in a different result here. Indeed, it would not, since respondent EMPIRE's contacts with the U.S. as a whole, are no greater than those it has with the State of New York.

II.

There was never any finding that New York's long arm statute was unconstitutional.

Petitioner's fears as to the consequences of the lower Courts' decision in this case as regards the constitutionality of the New York long arm statute are groundless. There was never any finding in the lower Courts that New York's long arm statute was

unconstitutional. The lower Courts simply found that it was subject to the requirements of Constitutional due process and that on the facts of this case, due process requirements barred an exercise of in personam jurisdiction over Respondents.

New York Courts have recognized that due process standards are determinative of whether a nonresident is amenable to suit under New York's long arm statute. *Martinez* v. *American Standard*, 91 A.D.2d 652, 457 N.Y.S.2d 97 (2d Dep't 1982), aff'd 60 N.Y.2d 873, 458 N.E. 2d 826, 470 N.Y.S.2d 367 (1983). Accordingly, the lower Courts here have not gone beyond a proposition recognized already by the Courts of New York.

Conclusion

It is respectfully submitted that this petition for a writ of certiorari should be denied.

Dated: New York, New York
May 20, 1985

Respectfully submitted,

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No. 84-1675

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IN THE

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OCTOBER TERM, 1984

PAKISTAN NATIONAL SHIPPING CORP.,

Petitioner,

—v.—

MOUNT ROYAL MARINE REPAIRS, LTD.,
ALUMINUM COMPANY OF CANADA, LIMITED and
EMPIRE STEVEDORING COMPANY, LTD.,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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84-1675 - Brf. in Opp.

STATEMENT OF RESPONDENT ALUMINUM COMPANY OF CANADA, LIMITED PURSUANT TO RULE 28.1 OF THE SUPREME COURT RULES

Respondent Aluminum Company of Canada, Limited, is a wholly owned subsidiary of Alcan Aluminium Limited.

The following are subsidiaries (excluding wholly owned subsidiaries) of respondent Aluminum Company of Canada, Limited:

Alcan-Price Extrusions Limited
Alpac Aluminium Inc.
Jamalcan (Joint Venture Association)
Toyo Aluminium K.K.

The following are subsidiaries of Alcan Aluminium Limited and affiliates of respondent Aluminum Company of Canada, Limited:

Camea S.A.
Alcan Aluminio America Latina Ltda.
Saguenay Shipping Limited
Alcan Pacific Limited
Aluminio Alcan de Colombia S.A.
Ghana Aluminium Products Limited
Compagnie des Bauxites Guinee
Alcan Aluminium (Asia) Limited
Indian Aluminium Company, Limited
Alcan Ivoire S.A.
Nippon Light Metal Company
Toyo Aluminium K.K.
Aluminium Company of Malaysia Berhad
Hunter Douglas N.V.
Alcan New Zealand Limited
Alcan Aluminium of Nigeria Limited
Alcan Thai Company Limited
Alcan Adminco Inc.
Alcan Aluminio (America Latina) Inc.

Alcan Aluminium Africa and Middle East Ltd.
Alcan Aluminium Products Ltd.
Alcan Basic Raw Materials Ltd.
Alcan East Asia Ltd.
Alcan Europe N.V.
Alcan Fiduciaries Ltd.
Alcan Finances Ltd.
Alcan Finances (Bda) Ltd.
Alcan Finances Overseas N.V.
Alcan Finances (U.K.)
Alcan International Ltd.
Alcan Shipping Services Ltd.
Alcan South Pacific Ltd.
Aluminio de Venezuala C.A.
Aluminium Enterprises, Inc.
Halco (Mining) Inc.
Maison Alcan Inc. Canada
Southeast Asia Bauxites Ltd. Canada
Unidare Ltd.

QUESTIONS PRESENTED FOR REVIEW

1. Did the lower courts correctly interpret section 302 of the Civil Practice Law and Rules of New York as not providing personal jurisdiction over a nonresident defendant that did not invoke the benefits of New York law?

2. If the lower courts erred in the interpretation of New York law, does the Due Process Clause protect a nonresident defendant from suit in a jurisdiction in which it has not invoked the benefits of that jurisdiction's law?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

STATUTES AND RULES INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI 4

POINT I—

THE JURISDICTIONAL ISSUE IN THIS CASE ARISES UNDER NEW YORK C.P.L.R. § 302(a) (3) (ii) AND THERE IS THEREFORE NO QUESTION OF A FEDERAL STANDARD OF JURISDICTION. 5

POINT II—

SECTION 302 OF THE NEW YORK CIVIL PRACTICE LAW AND RULES WAS NOT DECLARED UNCONSTITUTIONAL BY THE DISTRICT COURT. PETITIONER DID NOT MEET THE REQUIREMENTS OF THIS STATUTE. 8

CONCLUSION 9

TABLE OF AUTHORITIES

Cases: PAGE

Aquascutum of London, Inc. v. *S.S. American Champion,* 426 F.2d 205 (2d Cir. 1970) 5

Arrowsmith v. *U.P.I.*, 320 F.2d 219 (2d Cir. 1963) 6

DeJames v. *Magnificence Carriers, Inc.*, 654 F.2d 280 (3d Cir. 1981), *cert. denied,* 454 U.S. 1085 (1981) 6

DeMelo v. *Toche Marine, Inc.*, 711 F.2d 1260 (5th Cir. 1983) 6

Engineering Equipment Co. v. *S.S. Selene,* 446 F. Supp. 706 (S.D.N.Y. 1978) 6

Executive Jet Aviation, Inc. v. *Cleveland,* 409 U.S. 249 (1972) 5

Handley v. *Indiana & Michigan Electric Co.*, 732 F.2d 1265 (6th Cir. 1983) 6

Hanson v. *Denckla*, 357 U.S. 235 (1958) 8

Hedrick v. *Daiko Shoji Co., Ltd.*, 715 F.2d 1355 (9th Cir. 1983) 6

Insurance Corp. v. *Compagnie des Bauxites,* 456 U.S. 694 (1982) 7

Keeton v. *Hustler Magazine, Inc.*, ____ U.S. ____, 52 U.S.L.W. 4346 (Sup. Ct. March 20, 1984); *id.* at 4349 (Brennan J., concurring) 7

Kulko v. *California Superior Court,* 436 U.S. 84 (1978) 9

Leasco Data Processing Equipm. Corp. v. *Maxwell,* 486 F.2d 1326 (2d Cir. 1972) 7

PAGE

Martinez v. *American Standard,* 91 App. Div.2d 652 (2d Dept. 1982), *aff'd on the opinion of the Appellate Division,* 60 N.Y.2d 874 (1983) 8

World-Wide Volkswagen v. *Woodson,* 444 U.S. 286 (1980) 6, 8

Statutes

Civil Practice Law and Rules of New York § 302(a) 8

Federal Rules of Civil Procedure § 4(e) 4, 6

Securities Exchange Act § 27, 15 U.S.C. § 78aa 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1675

PAKISTAN NATIONAL SHIPPING CORP.,

Petitioner,

—v.—

MOUNT ROYAL MARINE REPAIRS, LTD.,
ALUMINUM COMPANY OF CANADA, LIMITED and
EMPIRE STEVEDORING COMPANY, LTD.,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Statutes and Rules Involved

The Civil Practice Law and Rules of New York provides in pertinent part as follows:

§ 302(a) Acts which are the basis of Jurisdiction

As to a cause of action arising from any of the acts enumerated in this section, the court may exercise personal jurisdiction over any nondomiciliary, . . ., who in person or through an agent:

* * *

3. Commits a tortious act without the state causing injury to person or property within the state except as to a cause of action for defamation of character arising from

> the act, if he . . ., (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce. . . .

Federal Rules of Civil Procedure 4(e) provides in pertinent part:

> Whenever a statute of the United States . . . provides for service of a summons . . . upon a party not an inhabitant of or found in the state . . ., service may be made under the circumstances and in the manner prescribed by the statute . . . . Whenever a statute . . . of the state in which the district court is held provides (1) for service of a summons upon a party not an inhabitant of or found within the state, . . . service may . . . be made under the circumstances and in the manner prescribed by the statute . . . .

Statement of the Case

This is an action to recover damages for personal injuries allegedly sustained and wrongful death allegedly incurred as a result of a fall by Thomas Mascuzzio on July 30, 1981, while he was working as a longshoreman in hatch #2 aboard the vessel, m/s KAPTAI, in Brooklyn, New York. The defendant and third party plaintiff apparently was the owner of the vessel. The vessel, more than two weeks prior to its call in New York, had called in Canadian ports, including Montreal and Port Alfred (A. 55-59).[1]

At Port Alfred, the vessel loaded a cargo of aluminum rods that had been sold F.A.S. Port Alfred, for delivery in Karachi, Pakistan (A. 48, A. 60). The stevedoring work was performed in hatches 3 and 4 of the vessel (A. 60). In addition to the regular stevedoring services for the aluminum rods, the

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1 Numerical references in parentheticals refer to pages of the Joint Appendix filed with the Court of Appeals for the Second Circuit.

Aluminum Company of Canada (Aluminum Company), at the special request of the defendant and third party plaintiff's Montreal agent, apparently supplied a gang of carpenters to secure certain cargo which had previously been stowed in various hatches of the ship. The Aluminum Company is not in the regular business of supplying such services for cargo loaded at other ports, but supplied the necessary labor in this case as an accommodation to the Pakistan National Shipping Corp. The securing work was completed in Port Alfred, Quebec. The Aluminum Company neither shipped nor purchased any of this previously stowed cargo (A. 49). The employees performing the stevedoring and lashing work reside in the vicinity of Port Alfred and the relevant work records are kept at Port Alfred (A. 49).

A review of the vessel's deck log revealed that prior to the vessel's call in Brooklyn, New York on July 30, 1981 the vessel had called in Philadelphia and Baltimore where additional cargo work was performed in various hatches (A. 40). The accident underlying this litigation is claimed to have occurred in the #2 hatch of the vessel when certain hatch boards fell under the decedent's weight (A. 51).

The moving papers of the Aluminum Company demonstrated that the company is a foreign corporation with its principal place of business in Montreal, Quebec. The company did not have offices or inventory in New York, had no directors, officers, employees or agents resident or assigned to duty within New York, did not advertise in New York, did not have warehouses, dealers, distributors or real property in New York, did not distribute, finance or service goods or services in New York, and had not sought qualification or registration to do business in New York (A. 48).

The opposition papers consisted solely of an attorney's hearsay affidavit and, with regard to the Aluminum Company, a purported loading sheet and stowage plan. Neither of these documents showed any work performed by the Aluminum Company in hatch #2 of the vessel where this accident is

alleged to have occurred. Not surprisingly, defendant and third party plaintiff does not offer a citation to the record for its assertion at page 4 of the Petition for Certiorari that the Aluminum Company had last placed the hatch boards in the forward end of the #2 hatch upper 'tween deck. Similarly, the defendant and third party plaintiff did not submit any evidence that the Aluminum Company expected or should reasonably have expected that its activities in Port Alfred would have consequences in New York. Indeed, the cargo stowed by the Aluminum Company was actually destined for Karachi, Pakistan, and the Aluminum Company did not ship or purchase any of the previously stowed cargo for which it provided a lashing crew (A. 48-49, A. 60). In short there was nothing to demonstrate that the Aluminum Company had notice that the vessel would call in New York, or even more to the point, that it purposefully availed itself of the privilege of conducting activities within New York.

Reasons for Denying the Petition

Petitioner urges certiorari on the grounds that there is complete discord in the lower federal courts concerning the appropriate standard to apply in judging personal jurisdiction in federal question cases. The circuit courts have had no difficulty dealing with this issue. Where a special federal statute permits assertion of personal jurisdiction or use of nationwide service, such as Section 27 of the Securities Exchange Act, 15 U.S.C. § 78aa, the courts have followed the provisions of Rule 4(e), and judged the constitutionality of the assertion of personal jurisdiction under the Fifth Amendment. Where, however, there is no special federal statute, the courts have recognized that personal jurisdiction, under F.R.Civ.P. 4(e), is drawn from the jurisdictional statutes of the state within which the district court is sitting. As provided in Rule 4(e), the assertion of jurisdiction is permitted only under "the circumstances and in the manner prescribed in the statute or rule." The state statute is then reviewed to ensure, as directed

by the Court, that there are constitutionally recognized contacts between the defendant, litigation, and forum.

Petitioner also urges certiorari on the grounds that the New York Long Arm Statute has been found unconstitutional and that such a finding is disruptive. The district court did not find the New York Long Arm Statute to be unconstitutional. The petitioner simply failed to prove the necessary predicates under that statute. In short, the decision of this case does not involve constitutional issues, but is limited to an interpretation of the New York jurisdictional statute.

POINT I

THE JURISDICTIONAL ISSUE IN THIS CASE ARISES UNDER NEW YORK C.P.L.R. § 302(a) (3) (ii) AND THERE IS THEREFORE NO QUESTION OF A FEDERAL STANDARD OF JURISDICTION.

Petitioner claims that the indemnity sought in the third party complaint is within the Admiralty Jurisdiction and therefore it is entitled to a federal or nationwide standard for service of process. Petitioner does not explain the relevance of such service of process to this matter. The respondents are incorporated in the Province of Quebec, and contacts with the United States in addition to New York contacts have not been shown.[2]

Even assuming relevance, petitioner's argument is flawed because it confuses subject matter jurisdiction of the district court with personal jurisdiction of that court. Admiralty claims of course provide subject matter jurisdiction under Article III, section 2 of the Constitution. *E.g. Executive Jet Aviation, Inc.* v. *Cleveland,* 409 U.S. 249, 272-73 (1972). The maritime nature of the claim, however, does not by itself

2 Here, as in *Aquascutum of London, Inc.* v. *S.S. American Champion,* 426 F.2d 205, 211 n.4 (2d Cir. 1970), the party seeking jurisdiction does not show that a federal standard would be more easily met. Consequently, the discussion of state versus federal standards raised by the petitioner is largely academic.

provide a basis for the assertion of personal jurisdiction by the district court.

Relying to a great extent on the provisions of F.R.Civ.P. 4(e),[3] the circuit courts that have directly considered the issue have held that assertion of personal jurisdiction is bounded by the limits of state jurisdiction in those admiralty cases that do not involve federal statutes or rules permitting assertion of personal jurisdiction. *DeMelo* v. *Toche Marine, Inc.*, 711 F.2d 1260 (5th Cir. 1983); *DeJames* v. *Magnificence Carriers, Inc.*, 654 F.2d 280 (3d Cir. 1981), *cert. denied*, 454 U.S. 1085 (1981); *see Engineering Equipment Co.* v. *S.S. Selene*, 446 F. Supp. 706, 709 n.11 (S.D.N.Y. 1978). In the Ninth Circuit the same rule has been applied as self-evident. *E.g. Hedrick* v. *Daiko Shoji Co., Ltd.*, 715 F.2d 1355, 1357-58 (9th Cir. 1983).

The Sixth Circuit in *Handley* v. *Indiana & Michigan Electric Co.*, 732 F.2d 1265 (6th Cir. 1983) found a variation on the Fourteenth Amendment analysis to be appropriate in federal question cases in which state jurisdictional statutes are invoked. The court did measure jurisdiction by the contacts between the defendant and the forum state, but limited its inquiry to what it perceived as only one of two purposes served by the Fourteenth Amendment, *viz.* protecting defendants from distant or inconvenient litigation. The other perceived purpose was to prevent encroachment by the states as coequal sovereigns. These two purposes were identified by this Court in *World-Wide Volkswagen* v. *Woodson*, 444 U.S. 286, 291-92 (1980). As later decisions of this Court have made clear, the Sixth Circuit in fact applied the usual Fourteenth Amendment standard and focused upon the actual purpose of the due process clause. The Fourteenth Amendment is not based upon

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3 *Arrowsmith* v. *U.P.I.*, 320 F.2d 219 (2d Cir. 1963), cited by petitioners as withholding opinion on the applicability of a federal standard in federal question cases, was decided before the amendment of F.R.Civ.P. 4(e) in 1963. That amendment adopted the second sentence of the subsection and the specific limitation on the use of state jurisdictional statutes to the circumstances permitted under state law.

federalism concerns; it protects the interests of individual liberty.

In *Insurance Corp.* v. *Compagnie des Bauxites,* 456 U.S. 694, 702 (1982), the Court referred specifically to this passage in *Woodson* and stated that the requirement of personal jurisdiction "represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty." In footnote 10 appended to this text, the Court quoted the federalism discussion in *Woodson,* explaining that restrictions on state sovereign power are ultimately based upon the individual liberty interest recognized in the Due Process Clause.

> That Clause is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns. Furthermore, if the federalism concept operated as an independent restriction on the sovereign power of the court, it would not be possible to waive the personal jurisdiction requirement. . . .

Id. at 702 n.10. *Accord Keeton* v. *Hustler Magazine, Inc.,* ____ U.S. ____, 52 U.S.L.W. 4346, 4347 (Sup. Ct. March 20, 1984); *id.* at 4349 (Brennan, J., concurring).

Although not plainly stated, the Sixth Circuit reached the correct result. That Circuit's standard is, therefore, in accord with the standards applied by the Third, Fifth and Ninth Circuits.[4]

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4 The petitioners citation of *Leasco Data Processing Equipm. Corp.* v. *Maxwell,* 468 F.2d 1326 (2d Cir. 1972) is not indicative of a conflict since that decision involved the specially enacted jurisdictional provisions of the federal securities laws. Indeed, the existence of such explicit federal jurisdictional statutes suggests that a federal standard is not to be applied unless Congress explicitly enacts a federal jurisdictional statute.

POINT II

SECTION 302 OF THE NEW YORK CIVIL PRACTICE LAW AND RULES WAS NOT DECLARED UNCONSTITUTIONAL BY THE DISTRICT COURT. PETITIONER DID NOT MEET THE REQUIREMENTS OF THIS STATUTE.

Petitioner asserts, without citation to the opinion, that the district court found the New York long-arm statute unconstitutional. District Judge Motley did not so hold. Petitioner simply failed to prove the predicate acts permitting assertion of jurisdiction. At page 3 of petitioner's brief in the Second Circuit, it is conceded that the basis of personal jurisdiction is CPLR 302(a) (3) (ii).

This provision requires:

1. a tort committed outside the state causing injury within the state;

2. substantial revenue from interstate or international commerce;

3. a reasonable expectation of consequences in New York.

The third requirement has been interpreted by the New York courts as including a purposeful availment by the defendant of the privilege of conducting activities within New York. *Martinez* v. *American Standard,* 91 App. Div.2d 652, 653-54 (2d Dept. 1982), *aff'd on the opinion of the Appellate Division,* 60 N.Y.2d 874 (1983). The purposeful availment requirement was drawn from this Court's decisions in *World-Wide Volkswagen Corp.* v. *Woodson,* 444 U.S. 286 (1980) and *Hanson* v. *Denckla,* 357 U.S. 235 (1958).

Contrary to the petitioner's unsupported assertions, there was no proof that the Aluminum Company committed an out-of-state tort causing New York injury. There is no evidence

in this record that the Aluminum Company ever acted in the hatch in which the accident occurred.

So too, there is nothing to show that this respondent conducted activities in New York. The Aluminum Company performed its functions in Port Alfred, Quebec, where the ship had traveled to obtain the services. The company was also retained in Montreal, Quebec through the petitioner's local agent. Moreover, there is nothing in the record to support petitioner's argument that this respondent knew the vessel was coming to New York. Without a showing of activities conducted in New York, such knowledge would not, in any event, be enough to permit exercise of jurisdiction. *See Kulko* v. *California Superior Court,* 436 U.S. 84 (1978).

The district and circuit courts have properly interpreted and applied the New York statute. Petitioner has simply not shown that the jurisdictional predicates exist.

CONCLUSION

RESPONDENT RESPECTFULLY SUBMITS THAT A WRIT OF CERTIORARI SHOULD NOT ISSUE TO REVIEW THE DECISION BELOW.

Respectfully submitted,

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